

Nguyen (Migration) [2023] AATA 1243 (13 February 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Ms Thi Thu Thao Nguyen Ms Thi Hong Ngoc Tran Ms Thi Bao Ngoc Tran
REPRESENTATIVE:	Mr Vinh Quang Duong (MARN: 0215067)
CASE NUMBER:	1912347
HOME AFFAIRS REFERENCE(S):	BCC2016/3235050
MEMBER:	Russell Matheson
DATE:	13 February 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.221(2) of Schedule 2 to the Regulations • The secondary applicants meet: • cl 820.321 of Schedule 2 to the Regulations.

Statement made on 13 February 2023 at 10:23am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – close business, cultural or personal ties in Australia – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 820.221, 820.321

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicants Partner (Temporary) (Class UK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
3. The first named applicant (the applicant) applied for the visa on 29 September 2016 based on her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.221(1)(a) because the delegate could not be satisfied that the applicant and the sponsor were in a genuine and continuing relationship up until the cessation of the relationship at the time of the sponsor's death.
5. The applicants appeared before the Tribunal on 29 September 2022 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's two daughters Ms Thi Hong Ngoc Tran and Ms Thi Bao Ngoc Tran.
6. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
7. The applicants were represented in relation to the review. The representative attended the Tribunal hearing.
8. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the applicant and the sponsor were in a genuine and continuing relationship at the time of the visa application on 29 September 2016 and whether they continued to be in a spousal relationship up until the time of the sponsor's death on 13 July 2018. The Tribunal notes that the delegate was satisfied that the parties met the requirements of cl 820.211(2) at the time of application.

Whether the parties are in a spouse or de facto relationship

10. Clauses 820.211 and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who was an Australian citizen.
11. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion

about these matters, regard must be had to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties provided a copy of their marriage certificate indicating that they were married on 20 August 2016 at Fairfield, NSW, under the *Marriage Act 1961*. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).
13. In forming an opinion whether the applicant and the sponsor were in a genuine and continuing relationship at the time of the visa application on 29 September 2016 and whether they continued to be in a spousal relationship up until the time of the sponsor's death on 13 July 2018 the Tribunal considered whether they had mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship was genuine and continuing, and whether they lived together and not separately and apart on a permanent basis as defined in s 5F(2)(b)-(d), the Tribunal has had regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the applicant's and sponsor's household and their commitment to each other as set out in reg 1.15A(3).
14. After careful consideration of all the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s 5F of the Act. Below, the Tribunal sets out its consideration of the evidence and the relevant aspects of matters it must take into consideration under reg 1.15A(3), and the reasons for its decision.
15. The Tribunal had the benefit of the applicant's and her two daughters' oral evidence and written submissions at the hearing and found their evidence to be consistent and overall, persuasive and credible. The Tribunal gave all the evidence provided at the Tribunal hearing and evidence provided by the applicant to the Department and the Tribunal file due regard. The applicant provided a significant amount of additional documentary and photographic evidence to the Tribunal.
16. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor during the hearing and the Tribunal is satisfied that the applicant was a credible witness.

Are the other requirements for a spouse relationship met?

17. As noted, the applicant lodged an application for a spouse visa on 29 September 2016. A delegate of the Department of Home Affairs refused the visa application in a decision made on 16 May 2019.
18. The evidence before the Tribunal indicates that during the processing of the visa application the sponsor died because of non-Hodgkin's lymphoma. The evidence indicates that he passed away on 13 July 2018. The evidence indicates that he and the applicant commenced a relationship in around March 2016 and that they were married on 20 August 2016, approximately two years prior to him being diagnosed with non-Hodgkin's lymphoma.

19. Financial aspects

20. The applicant provided written and oral evidence to the Tribunal that when the parties married in August 2016 the sponsor was the sole income earner working two jobs and that he financially supported the applicant and her two daughters. The applicant gave evidence that she eventually gained employment with Victor Footwear Company in February 2017 and later went on to work for Mongrel Boots in Auburn. She further stated that the sponsor worked as a container painter/cleaner, and that he worked a second job on weekends in a dry-cleaning business. The applicant gave evidence that the parties operated a joint account with Westpac Bank and their wages were paid into the joint account. The applicant stated that the sponsor also had his own personal account with the National Australia Bank (NAB) that was used for emergency expenditure, and they were saving for a deposit on their own home. The applicant stated that the sponsor managed their financial affairs. There is documentary evidence before the Tribunal that the sponsor bequeathed his estate to the applicant in his last will and testament.
21. The applicant gave evidence that when the sponsor was alive the parties lived in a granny flat at the back of her aunt's residence in Bankstown with her two daughters, paying \$300 per week rent. There is sufficient corroborating evidence to establish that this was the case. The applicant gave evidence that she is now living with her two daughters who are full-time students in a unit at Padstow.
22. Overall, the Tribunal finds that there is a significant amount of evidence before it to demonstrate that the applicant and sponsor have pooled or shared their financial resources at the time of application and would have continued to do so until the cessation of the relationship because of the sponsor's death. The applicant provided detailed evidence regarding the parties' employment, rent, individual incomes and payment of household bills, the pooling and sharing of their financial resources and their future financial plans.
23. The Tribunal accepts that the financial aspects of the relationship were consistent with a genuine spousal relationship.

24. *Nature of the household*

25. The applicant in her written submissions and oral evidence gave detailed and consistent evidence about the parties' living arrangements. The applicant's two daughters also gave oral evidence regarding the care comfort and support provided to them by the sponsor and the Tribunal found them to be persuasive, genuine and credible. The applicant gave evidence that they lived together since marriage and the Tribunal is satisfied that the parties lived together in a spousal relationship. The applicant provided evidence of sharing the household duties and responsibilities and individual tasks in detail. She provided consistent evidence of the parties living arrangements and details about their daily lives, employment, income, work hours, health issues and social activities. The applicant provided a significant amount of documentary evidence and correspondence in individual and joint names to the Tribunal and Department indicating that they had lived together for a significant period at their address in Bankstown, NSW. The applicant gave evidence that she and her two daughters cared for and supported the sponsor when he was initially diagnosed with cancer at their home until they were unable to do so and that he was eventually admitted to Liverpool Hospital for a better quality of care, and they visited him in hospital daily.
26. Overall, the Tribunal accepts that the parties lived together, and that they established a joint household and shared the responsibility of the housework. The applicant stated that the parties jointly provided financial support for her children's education and basic needs, such as food, clothing and shelter when the sponsor was alive.
27. The Tribunal accepts that the parties lived together and that they established a joint household at the time of application and would have continued to do so except that her

sponsoring partner has died. The Tribunal accepts that they shared the responsibility for the household duties and the care and support of the applicant's children.

28. *Social aspects*

29. The Tribunal considered the social aspects of the relationship, including whether the parties represented themselves to other people as being married to each other, the opinions of friends and acquaintances about the nature of the relationship, and any basis on which the persons planned joint social activities.
30. The evidence before the Tribunal indicated that the applicant and sponsor socialised as a couple. The evidence included third party statements, photographs and Facebook posts. The Tribunal accepts that the parties socialised together as a couple and represented themselves to family and friends as being married to each other.
31. The Tribunal is satisfied the parties planned and undertook joint social activities and represented themselves to others as being married to each other. The Tribunal accepts that the parties' family and friends believe that they were in a genuine and continuing spousal relationship until the sponsor died. The Tribunal is satisfied that there was family support for the relationship.

32. *Commitment*

33. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length of time the parties have lived together, the degree of companionship and emotional support they provide each other and whether the parties viewed the relationship as a long-term one.
34. The evidence before the Tribunal was that the parties first met in April 2015 at the applicant's aunt's house in Bankstown when the applicant was visiting her aunt in Australia on a visitor visa with her daughter. The parties became friends and remained in contact when the applicant returned to Vietnam, and they developed a long-distance relationship. The applicant returned to Australia in March 2016, and they entered a committed relationship. In June 2016 the sponsor travelled to Vietnam to visit the applicant. The applicant and sponsor then travelled to Singapore for a holiday together and during this time the sponsor proposed to the applicant, and they became engaged. The parties returned to Australia and were married on 20 August 2016.
35. On 10 August 2017, the sponsor was diagnosed with cancer and on 13 July 2018, the sponsor passed away at Liverpool Hospital. The applicant and her daughters gave evidence of being at the bedside of the sponsor for lengthy periods of time when he was in hospital. The applicant stated that the sponsor did not like the hospital food, and she prepared Vietnamese-style meals and took them to the hospital for his consumption and that she gave him massages and fed him his food.
36. The applicant gave evidence that when the sponsor passed away, she and her daughters organised his funeral according to Buddhist culture and rituals.
37. As previously mentioned, (para 19) there is documentary evidence before the Tribunal that the sponsor bequeathed his estate to the applicant in his last will and testament and a significant amount of savings. The Tribunal places significant weight on the last will and testament of the sponsor. The sponsor also appointed the applicant as his enduring guardian so that she could carry out his wishes and make decisions on his behalf.

38. The applicant told the Tribunal that she and the sponsor had a good and loving relationship up until the final months of the sponsor's life. If his death had not happened the applicant and her two daughters (witnesses) were clear that the relationship would have continued. The commitment to each other and the family unit was paramount. The Tribunal accepts that there was a strong commitment to the relationship from both parties.
39. However, more importantly, in the Tribunal's opinion, was the fact the applicant became her husband's dutiful carer from the time he was diagnosed with Non-Hodgkin's Lymphoma. From this, the Tribunal can only conclude that the applicant's commitment to her husband was for life.

40. **Conclusion**

41. *Whether the applicant would have continued to meet the spousal relationship except that the sponsoring partner has died and whether the applicant would have continued to be the spouse of the sponsoring partner if he had not died*

42. The Tribunal listened carefully to all the evidence before it at the hearing and from the Tribunal heard from the applicant and from the witnesses present and coupled by the remarks made by her migration agent, the Tribunal is satisfied that had the sponsor's death not intervened on 13 July 2018, the relationship as a married couple that had been established in March 2016 would have continued and the applicant would have continued to be the spouse of the sponsoring partner if he had not died. There was nothing in the evidence the Tribunal heard from applicant and witnesses to suggest doubts about the relationship's bona fides. It was a genuine marital partnership that had endured for a reasonable period (since 2016) and was cut short by death in 2018.
43. Having carefully considered all of the material, the Tribunal is satisfied that the applicant and sponsor had a mutual commitment to a shared life together to the exclusion of all others and were in a genuine and continuing relationship and lived together up until the sponsor's death. In making these findings the Tribunal has had regard to evidence of financial aspects of the relationship, nature of the household and social aspects of the relationship and the commitment to each other. The Tribunal accepts that at the time of the sponsor's illness the relationship would have been tested but the deceased remained committed to his wife and she and her daughters remained at his side until the end of his life.
44. Accordingly, the Tribunal finds that the relationship between the applicant and the sponsor was at the time of the sponsor's death, genuine and continuing and the applicant meets the time of decision requirements of cl 820.221(2).
45. The Tribunal is also satisfied that the applicant would have continued to be the spouse of the sponsoring partner if the sponsoring partner had not died. Therefore, the applicant meets cl 820.221(2).
46. The Tribunal is satisfied that the secondary visa applicants are members of the family unit of, and made a combined application with, the applicant who satisfies the primary criteria in cl 820.221(2). Therefore, the secondary applicants meet the requirements of cl 820.321 of Schedule 2 to the Regulations.
47. *Whether the applicant has developed close business, cultural or personal ties in Australia*
48. The requirement is that the applicant 'has developed close business, cultural or personal ties in Australia'. There is no specific case law that has considered this phrase in this context.

49. **Department guidelines (PAM3)** include an opinion on the meaning of this requirement. While the Tribunal may consider Departmental guidelines regarding the interpretation of a legislative provision, it should not treat the Department's opinion as determinative in such matters. PAM3 suggests that in assessing whether an applicant has *developed* close ties, officers should consider the extent to which ties have *formed* and/or *strengthened* over time. However, it is important to note that nothing in the words of the Regulations suggest any specific temporal requirement, or degree of strength of the tie beyond the requirement that it be 'close', and it would be an error of law to impose more stringent standards than the language of the Regulations requires. As it is a time of decision criteria, it is sufficient if the applicant has satisfactory evidence of relevant ties as at the date of the Tribunal's decision.
50. The Tribunal accepts that the applicant has developed close personal ties in Australia. She has re-married to an Australian citizen. The applicant has after a significant period in Australia formed her ties within the Australian community and has become accustomed to a different life – taking comfort from the friends she has made here because of her marriage to the deceased and she provided evidence of strong cultural ties to the Buddhist community in Western Sydney and participating in numerous charity and fundraising events of benefit to the broader community. The Tribunal accepts on the oral evidence that the applicant has tied herself closely to her friends in Western Sydney where she has lived for a considerable period and is attached to them as *her* family. To observe their support of her in hearing satisfied the Tribunal as to how close the applicant was and is to her personal ties in Australia.
51. Having regard to these findings the applicant meets the requirement of cl 820.221 and the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

52. The Tribunal remits the applications for Partner (Temporary) (Class UK) visas, with the direction that the first named applicant meets the following criteria for a Subclass 820 (Partner) visa:
- CI 820.221(2) of Schedule 2 to the Regulations
53. The secondary applicants meet
- CI 820.321 of Schedule 2 to the Regulations.
- 54.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).